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No. 21

The Supreme Court of the United States

OCTOBER TERM, 1931

VIVIAN F. BALDWIN and E. R. BALDWIN,
Petitioners,

vs.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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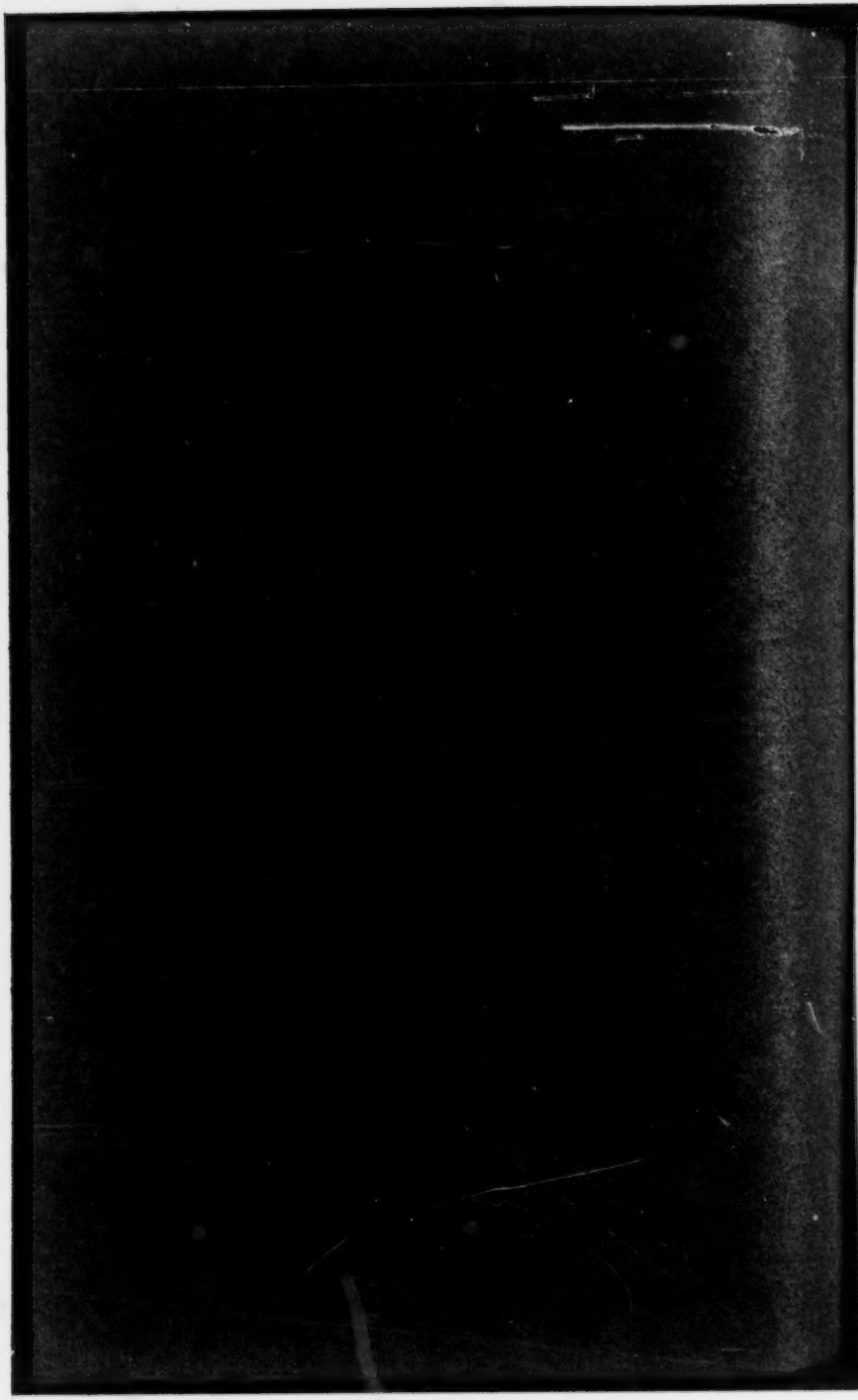

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The Supreme Court of the United States

OCTOBER TERM, 1931

VIVIAN F. BALDWIN and E. R. BALDWIN,
Petitioners,

vs.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

JUDGMENT NOT FINAL

Preliminary to a discussion of other questions, attention is called to the fact that the judgment of the Circuit Court of Appeals is not final. The order dismissing the bill was vacated and set aside and the case was remanded to the District Court with instructions to grant a *temporary injunction*, as prayed for. Obviously, the cause now comes before the District Court for trial on the merits. (R. 265.)

BRIEF STATEMENT OF THE ESSENTIAL MATTERS INVOLVED

The Baldwins recovered a judgment for $19,500.00 against one Anderson (employee) and Singer Sewing Machine Company (employer) for an automobile collision. Both defendants appealed, by their respective attorneys, to the Idaho Supreme Court (R. 2-3). Anderson gave a bond for costs only, but the Company stayed the judgment against it by giving a supersedeas undertaking with the American Surety Company as surety (R. 3-4).

On appeal, the judgment was affirmed as to Anderson but reversed as to the Company, and the action dismissed as to it (R. 4-5). (Baldwin vs. Anderson, 49 Ida. 231.)

The lower State Court, pursuant to the remittitur from the Supreme Court, entered judgment in favor of the Singer Sewing Machine Company and against the Baldwins for costs on appeal and dismissed the Sewing Machine Company from the case (R. 22). About thirty days thereafter, the lower State Court, apparently inadvertently and *without notice to or process upon the American Surety Company*, entered judgment against the Surety Company on the supersedeas bond of the Singer Sewing Machine Company for the failure of Anderson to pay the judgment which had been affirmed as to him (R. 6-8, 24). As soon as the Surety Company learned of such judgment, it moved

to set it aside as void (R. 9-10, 36-39), and the judgment was duly vacated (R. 9-10, 41).

The Baldwins again appealed to the Idaho Supreme Court, which held that the lower Court, having once entered up the judgment against the Surety Company, had no power to vacate it (R. 47, dissenting opinion of Justice Budge, R. 56). The judgment of the lower Court was thereupon reinstated, and accordingly the Surety Company has a judgment against it for $22,357.21 (R. 24-26), with interest from June 23, 1930, because of the default of Anderson, who gave no supersedeas and was not embraced within the terms of the undertaking given by the Surety Company in behalf of the Singer Sewing Machine Company. The judgment against the Surety was rendered against it *without notice or process, or an opportunity to defend, and for the default of one for whom it was not surety.*

The Idaho Supreme Court expressly disclaimed any intention to consider the merits of the Surety Company's case but it confined itself wholly to the matter of procedure. It expressly refused to construe the undertaking or determine whether it obligated the surety to pay the judgment affirmed as to Anderson but reversed as to the principal in the undertaking. It simply held that the Surety Company should have appealed from the judgment thus entered against it for the default of Anderson and for whom it was not a surety, and that the lower court had no jurisdiction or authority to vacate or set aside such judgment after it had been entered.

The Idaho Supreme Court, on the appeal of the Baldwins from the order vacating the judgment against the surety, in answer to the argument of counsel for the surety that the undertaking did not cover Anderson and that it was a fraud upon the trial court for counsel to request it to enter judgment *ex parte* and without notice against the surety, expressed the essence of its decision in the following words:

> (R. 55.) "The undertaking cannot be examined and its legal effect as to that issue be determined by us on this appeal. * * * (R. 56.) We think, regardless of what our construction of the bond might be, it cannot be said appellants held no right to submit the question."

Justice Budge dissented vigorously from the opinion of the majority for refusing to consider the case on the merits. His dissenting opinion is of importance because he is the only member of the Supreme Court of Idaho that has expressed any opinion on the merits of the case or on the construction of the undertaking. Justice Budge said:

> (R. 64.) "The bond upon its face, in unmistakable language, shows that it was given to stay execution against the Singer Sewing Machine Company and for no one else, and the court therefore had no authority to construe the bond to include the judgment against Anderson. The judgment against the surety company on the supersedeas bond was therefore void when entered, and was subject to attack by motion to, and was properly set aside.

> No other result can follow from the holding of the majority than a miscarriage of justice, and it is repugnant to both the state and federal constitions in that the surety company is deprived of its property without due process of law."

The time for taking an appeal from the judgment had expired before the above decision was rendered. However, an appeal was nevertheless taken from the judgment, and that appeal was recently dismissed by the Idaho Supreme Court without again considering the merits of the case or even examining the undertaking (Baldwin vs. Anderson, et al., 8 Pac. (2d) 461). (Advance Sheet No. 2, Mar. 25, 1932.)

It is true that the Supreme Court of Idaho said:

> (R. 52.) "The undertaking is a complete independent contract",

but it did not hold that such undertaking, given under the provisions of Section 7155, C. S. Idaho, (set out in Appendix A to the petition), is not a contract of suretyship, and that such surety does not have a principal for whose default it is to become liable upon certain express conditions. The undertaking, obviously, shows that there was a principal as well as a surety, and every court and every judge that has examined the undertaking and expressed an opinion thereon has unqualifiedly held that the Surety Company was liable only for the default of the Singer Sewing Machine Company and not for the default of Anderson. That was the unqualified decision of the lower State Court that en-

tered the judgment against the surety and later vacated it and set it aside, that was the opinion of Justice Budge of the Supreme Court, and that was the unanimous opinion of the Judges of the Circuit Court of Appeals. No court or judge has ever expressed any opinion to the contrary.

SURETY COMPANY SEEKS PROTECTION OF FEDERAL COURT

The Surety Company, being confronted with a judgment entered against it without notice or service of process, and without an opportunity to be heard on the merits of its case, asserted its claims under the Federal Constitution and sought the protection of the Federal Courts. It promptly filed its bill for an injunction against the judgment creditors and sought to enjoin them from enforcing the judgment thus wrongfully obtained against it in the State Court. The history of the litigation and the facts as to the rights of the surety are fully set out in the bill of complaint (R. 17). The facts so alleged are admitted by the motion to dismiss filed by the Baldwins. The motion to dismiss was sustained and a temporary injunction denied respondent (R. 192-194). From the decree dismissing the bill, the Surety Company appealed to the Circuit Court of Appeals, which preserved the subject-matter of the litigation during the pendency of the appeal by issuing an injunction (R. 245-248).

The decision of the Circuit Court of Appeals (55 Fed. (2d) 555 (Advance Sheet No. 2, March 28, 1932). R. 250-264) gives full faith and credit to the decision of

the Idaho Supreme Court but goes further and passes upon a matter which the State Court refused to pass upon, and upon which the Surety Company had never had its day in court, to-wit: whether, in the undertaking, the Surety Company had obligated itself as surety for Anderson as well as for the Singer Sewing Machine Company.

WHAT THE CIRCUIT COURT OF APPEALS HELD

(1) The essence of the decision of the Circuit Court of Appeals, as stated by that Court, is:

> (R. 258.) "The surety agreed to stand good for the obligation of Singer Sewing Machine Company if that obligation was affirmed by the Supreme Court of Idaho on appeal. But that court held there was no obligation on the part of the Singer Sewing Machine Company and reversed the judgment against it. By the *ex parte* judgment entered the surety was called upon to answer for an entirely different obligation, that of Anderson."

(2) The Federal Statute (Sec. 379, Title 28, U. S. C.) applies only to enjoining parties *before final judgment* and has no application *after* judgment has been entered.

> Simon vs. Southern Ry. Co., 236 U. S. 115, 59 L. Ed. 492.
>
> Essanay Film Co. vs. Kane, 258 U. S. 358, 66 L. Ed. 658.

Wells Fargo & Co. vs. Taylor, 254 U. S. 175, 185, 65 L. Ed. 205.

Smith vs. Apple, 6 Fed. (2d) 559 (C. C. A. 8).

Fetzer vs. Johnson, 15 Fed. (2d) 145, 152 (C. C. A. 8).

National Surety Co. vs. State Bank, 120 Fed. 593 (C. C. A. 8).

Julian vs. Central Trust Co., 193 U. S. 112, 48 L. Ed. 629.

(3) The adequate remedy at law which is the test of equitable jurisdiction in the Federal courts must be an adequate remedy available in *those courts*. A remedy in the State Court is immaterial.

Franklin vs. California-Nevada Co. (C. C. A. 9), 264 Fed. 643.

C. B. & Q. Ry. vs. Osborne, 265 U. S. 14, 68 L. Ed. 878.

Risty vs. Chicago, R. I. & P. Ry. Co., 270 U. S. 378, 70 L. Ed. 642.

National Surety Co. vs. State Bank, 120 Fed. 593, 61 L. R. A. 394 (C. C. A. 8).

U. S. Life Ins. Co. vs. Cable (C. C. A. 7), 98 Fed. 761.

Coler vs. Board, 89 Fed. 257.

Borden's Condensed Milk Co. vs. Baker (C. C. A. 3), 177 Fed. 906.

3 Cyc. Fed. Procedure, page 112.

(4) A litigant need not exhaust his remedy in the State Court before seeking relief in the Federal Court. It is immaterial that he may have a right to appeal or

the right to other legal or equitable relief in the State Court.

Borden's Condensed Milk Co. vs. Baker, 177 Fed. 906 (C. C. A. 3).

National Surety Co. vs. State Bank, 120 Fed. 593 (C. C. A. 8).

Chicago, R. I. & P. Ry Co. vs. Callicotte (C. C. A. 8), 267 Fed. 799, 16 A. L. R. 386. (Certiorari denied, 255 U. S. 570.)

(5) Due process of law means notice and an opportunity to defend *before* judgment is entered.

In Truax vs. Corrigan, 257 U. S. 312, 332, this Court said:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

ARGUMENT

The following cases from other Courts of Appeals are substantially identical, both as to the facts and the law, with the case at bar, and many of them have been repeatedly cited and approved by this Court:

National Surety Co. vs. State Bank, 120 Fed. 563 (C. C. A. 8).

Exchange National Bank vs. Joseph Reid Gas Engine Co., 287 Fed. 870 (C. C. A. 5).

Smith vs. Apple, 6 Fed. (2d) 559 (C. C. A. 8).

Chicago, R. I. & P. Ry. Co. vs. Callicotte, 267 Fed. 799 (C. C. A. 8).

Borden's Condensed Milk Co. vs. Baker, 177 Fed. 906 (C. C. A. 3).

The following cases in this Court sustain the decision of the Circuit Court of Appeals in the case at bar:

Wells Fargo & Co. vs. Taylor, 254 U. S. 175.

Marshall vs. Holmes, 141 U. S. 589.

Ex Parte Simon, 208 U. S. 144.

Simon vs. Southern Ry. Co., 236 U. S. 115.

Public Service Co. vs. Corboy, 250 U. S. 153.

Risty vs. Chicago, R. I. & P. Ry. Co., 270 U. S. 378.

Essanay Film Co. vs. Kane, 258 U. S. 358.

THE CASE OF BALDWIN VS. IOWA TRAVELING MEN'S ASSN., 283 U. S. 522, MUCH RELIED UPON BY PETITIONERS, HAS NO APPLICATION.

There the litigant had appeared specially in the Federal Court for Missouri and contested the jurisdiction of that Court. From a decision against him, he took no appeal. Later, the judgment was sought to be enforced against him in the State of Iowa, and the defendant again raised the question of lack of jurisdiction in the Missouri court to enter the original judgment. This court simply held that that question had been de-

termined by the Federal Court for Missouri and from that decision no appeal had been taken, and the litigant could not again raise the question or seek an other adjudication thereof. Obviously, the case has nothing in common with the case at bar.

Petitioners call attention to the fact that there is now pending in this Court, pursuant to an order entered on January 11, 1932, the case of American Surety Co. vs. Baldwin, October Term, 1931, No. 494, on petition for certiorari to review the judgment of the Idaho Supreme Court in Baldwin vs. Anderson, 50 Ida. 606 (R. 47), wherein the Idaho Supreme Court held that the proper procedure of the Surety Company was by appeal from and not by motion to vacate the judgment entered against it by the lower State Court without notice or process.

Obviously, the judgment in the State Court will be effectually disposed of if the Federal Courts, upon final hearing and trial on the merits of the case at bar, enjoin the Baldwins from enforcing the judgment in the State Court. But if such injunction, for any reason, cannot issue, then the Surety Company can only be protected against a most unconscionable judgment by a review on certiorari of the above mentioned decision of the Idaho Supreme Court.

Case No. 494 is pending before this Honorable Court under an order deferring consideration of the petition pending the determination of two objections raised by the Baldwins, viz., the pendency of the appeal before

the Idaho Supreme Court from the original judgment (this appeal has since been dismissed by the Idaho Supreme Court—Baldwin vs. Anderson, 8 Pac. (2d) 461), and the appeal from the order of the lower State Court refusing to correct and revise the judgment entered against the Surety Company, which appeal is still pending.

We respectfully submit that if this Honorable Court entertains the present petition on behalf of the Baldwins, the petition for certiorari on behalf of the American Surety Company of New York (Case No. 494) should be considered and heard at the same time.

THE PETITION SHOULD BE DENIED

The petition of the Baldwins for certiorari should be denied because:

(a) The judgment of the Circuit Court of Appeals is *not final* but the cause is remanded to the trial court for hearing on the merits;

(b) The decision of the Circuit Court of Appeals is NOT in conflict with the decision of any other Circuit Court of Appeals but is in harmony with many decisions of other Circuit Courts of Appeals and with the decisions of this Court;

(c) The Circuit Court of Appeals has not decided any question of local law in conflict with applicable local decisions—it has merely construed an undertaking

which the State Supreme Court held that it could not construe except on an appeal from the judgment against the surety;

(d) The Circuit Court of Appeals has not decided any question of general law contrary to any authority on the subject but in harmony with all Federal decisions, including the decisions of this Court;

(e) There has been no departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power of supervision.

Respectfully submitted,

OLIVER O. HAGA,
FRANK MARTIN,
Counsel for Respondent.

FILE COPY

Nos. 3 and 21.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 3.

AMERICAN SURETY CO.,

Petitioner,

vs.

VIVIAN F. BALDWIN, *et al.*,

On Writ of Certiorari to the Supreme Court of Idaho.

No. 21.

VIVIAN F. BALDWIN, *et al.*,

Petitioners,

vs.

AMERICAN SURETY CO.,

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR AMERICAN SURETY CO.

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Counsel for American Surety Co.

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SUMMARY OF POINTS DISCUSSED.

FIRST POINT (No. 3).

Idaho has deprived the Surety Co. of its property without due process of law, because:

1. The Surety Co. did not consent in advance (by the supersedeas) that judgment might be rendered against it for the *Anderson* judgment if it were affirmed 15

2. The *ex parte* judgment against the Surety Co. was therefore *absolutely void* for lack of summons or notice 25

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Opinions below. **No. 3:** *Baldwin* v. *Anderson*, 50 Idaho 606; **No. 21:** *American Surety Co.* v. *Baldwin*, 51 Fed. (2d) 596; C. C. A. 55 Fed. (2d) 555.

Jurisdictional authority. Judicial Code §§ 237(b), 240(a), as amended February 13, 1925.

Date of judgment, etc. **No. 3:** May 2, 1931 (R. 45), rehearing denied June 3, 1931 (R. 117); time for certiorari extended by BRANDEIS, *J.*, until October 31, 1931 (R. 119); petition for certiorari filed October 30, 1931; certiorari granted April 25, 1932 (R. 119; 286 U. S. 536).

No. 21: August 1, 1931 (R. 192-194); in C. C. A. January 18, 1932 (R. 265), rehearing denied February 23, 1932 (R. 266); petition for certiorari filed March 21, 1932; certiorari granted April 25, 1932 (R. 271; 286 U. S. 537).

Nature of cases, statute involved, etc. Certiorari having been granted in both cases, any argument as to jurisdiction here, is probably unnecessary, but to comply formally with the Rules it is submitted:

No. 3: The Supreme Court of Idaho held (50 Idaho, 606: R. 46) that the Surety Co.'s execution of a *supersedeas* "undertaking" pursuant to Idaho Compiled Statutes, § 7155, given solely on behalf of the Singer Sewing Machine Co. to enable it to stay execution on a damage suit judgment pending appeal, nevertheless automatically made the Surety Co. such a party to the damage suit as bound it by any future action against it in such suit without notice to it; so that, although the judgment against the Singer Co. was reversed and the suit dismissed as to it, the Court could, without process or notice to the Surety Co., render a valid judgment against it for the liability of a co-defendant who had not superseded, without any opportunity to the Surety Co. to be heard as to its liability. That is in violation of the 14th Amendment (*National Exchange Bank* v. *Wiley*, 195 U. S. 257; *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25; *Missouri* v. *North*, 271 U. S. 40).

No. 21: The Circuit Court of Appeals enjoined the enforcement of the *ex parte* judgment above mentioned, upon the ground that the Surety Co. had been deprived of its property without due process of law (51 Fed. (2d) 596; C. C. A. 55 Fed. (2d) 555).

IN THE

Supreme Court of the United States.

OCTOBER TERM 1932; NOS. 3 AND 21.

AMERICAN SURETY CO. *Petitioner*

vs. No. 3. [50 Idaho 606]

VIVIAN F. BALDWIN *et al.*

On writ of certiorari to the Supreme Court of Idaho.

VIVIAN F. BALDWIN *et al.* *Petitioners*

vs. No. 21 [51 Fed. (2d) 596; C. C. A. 55 Fed. (2d) 555]

AMERICAN SURETY CO.

On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR AMERICAN SURETY CO.

The question involved is whether the State of Idaho has deprived the American Surety Co. (hereafter called Surety Co.) of its property without due process of law, by rendering a $22,357.21 judgment against it, without giving it any notice, or any opportunity to be heard or to present evidence or reasons that it was not liable; and, the controversy would never have arisen except for an incident, as to which

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Reference to the Record in No. 3 will be cited as (R.); to the Record in No. 21 as (No. 21, p.).

the following observation of Mr. Justice LURTON in *Venner* vs. *Farmers Loan & Trust Co.*, 90 Fed. 348, is in point:

> "We may say of Venner, touching the whole series of his dealings . . . 'It looks very much as if he had dug a pit, and was anxiously keeping the pathway to it in good order.' Into this pit he has fallen, and must there lie."

STATEMENT OF THE CASE.

1. *The Baldwins' $19,500 judgment against Singer Co. and Ed. Anderson; supersedeas by Singer Co. only, with Surety Co. as surety; reversal of judgment as to Singer Co. and its final dismissal from the suit: and the Baldwins' plan for recovery against Surety Co. notwithstanding the reversal.* On May 31, 1928, an Idaho court rendered judgment in favor of the Baldwins (for $19,500 damages and $73.70 costs for an automobile collision) against the Singer Co. and one of its employees, Ed Anderson (R. 2); from "the whole" of which judgment they both appealed (R. 3, 12, 13). The Surety Co. executed two separate, and very distinct, "undertakings".*

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* One "undertaking" was a $300 cost bond on behalf of both appellants, by which the Surety Co. promised "on the part of said appellants, Singer Co., a corporation, and Ed Anderson that the said appellants will pay all damages and costs which may be awarded against them on appeal" not exceeding $300 (R. 4). That "undertaking" is not here involved, except as it is reflexly contrasted with the *supersedeas "undertaking"* next noticed below.

The other "undertaking", and out of which these cases arise, was the *supersedeas* bond for the Singer Co. alone, executed under Idaho Compiled Statutes, Sect. 7155:

> "Sect. 7155. SAME: SUPERSEDEAS: MONEY JUDGMENT: If the appeal be from a judgment or order directing the

The Surety Co.'s "undertaking" did not refer, directly or indirectly, to Anderson (R. 6, 7). It merely recited the *Singer Co.'s* appeal, *its* desire to stay execution, and then provided that "if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed", the *Singer Co.* would pay the judgment; and, if not paid by the *Singer Co.* within thirty days from the filing of the *remittitur* [mandate] from the appellate court, then, and then only, (R. 7),

> "judgment may be entered on motion of the respondents [Baldwins] in their favor and against the undersigned surety" for $19573.70 together with interest, damages and costs "which may be awarded against the said appellant, Singer Co. upon the appeal" (R. 6, 7).

The important thing to notice is that, by the express terms of the "undertaking," the Surety Co.'s obligation to

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payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed or the appeal dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part and all damages and costs which may be awarded against the appellant on the appeal and that if the appellant does not make such payment within 30 days after the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent in his favor, against the sureties for such amount together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant on the appeal."

pay *only arises,* if and when the *Singer Co.* fails to pay; and there could be no failure by the Singer Co. to pay, if the judgment against it be *reversed.* On April 10, 1930, the Supreme Court of Idaho *reversed* the judgment as to the Singer Co. and *affirmed* it as to Anderson (*Baldwin* v. *Anderson,* 49 Idaho 231; R. 14); and on May 22, the *remittitur* was filed below (R. 15, 16).

On May 24, 1930, the lower Court, pursuant to the *remittitur,* entered a new judgment dismissing the suit as to the Singer Co., by which it did formally (R. 16):

> "ORDER, ADJUDGE AND DECREE that the plaintiffs Vivian F. Baldwin and E. R. Baldwin *take nothing* from defendant Singer Co.; and that the said cause of action be, and the same is hereby *dismissed* as to the defendant Singer Co., a corporation" [and gave judgment in favor of the Singer Co. against the Baldwins for costs].

This left the Baldwins with nothing but a worthless judgment for $19,500 against the insolvent Ed Anderson.

At the risk of repetition, it must be here emphasized that the condition of the Surety Co.'s "undertaking" was (R. 7):

> "that if the said judgment appealed from, or any part thereof, be affirmed . . . the appellant [Singer Co.] will pay . . . the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part . . . and that if the said appellant [Singer Co.] does not make such payment" judgment may be taken against the surety.

That did not mean that the Singer Co. thereby agreed to pay the judgment against *Anderson,* but only the judgment against *itself.* The Surety Co.'s obligation was only to pay what its principal, Singer Co., was obliged to pay.

At this point, the Baldwins carefully devised a plan to secure an impregnable *ex parte* judgment against the Surety Co. by the following procedure: To assert (1) That the Surety Co. should be held for the judgment against *Anderson;* (2) That, under the terms of the *supersedeas* "undertaking", no notice was necessary to be given to the Surety Co. of an intention to hold it for *Anderson's* default (*U. S. F. & G. Co.* v. *Fort Misery Highway District,* 22 Fed. (2d) 369), before rendering judgment against it and then, if the lower court could be induced to render an *ex parte* judgment against the Surety Co., it would necessarily result in, (3) That the Surety Co. would, therefore, have no opportunity to be heard in defense of (1) and (2); and (4) That when the Surety Co. should subsequently first learn of the *ex parte* judgment that had been secretly rendered against it, it would be too late to effectively protect itself under an *ex parte* record made up against it.

Just here, is where the Baldwins fell into the pit so carefully prepared for the Surety Co. (p. 2, *supra*).

If they had only given notice to the Surety Co. and had then successfully persuaded the Idaho courts to construe the *supersedeas* "undertaking" as they desired, doubtless such construction (and the Surety Co.'s resultant liability thereunder) would have been final, the Surety Co. would have had its day in court, and any subsequent resort to the Federal Courts might have been futile.

But, fearful lest on a fair hearing, even the Idaho courts would not adopt such a violent construction of the *supersedeas,* the Baldwins decided not to give any notice to the Surety Co. and to take their chances on the validity of such a course. But in so doing, while they carefully avoided

Scylla [a hearing], they unconsciously fell afoul, as we contend, of Charybdis, *i. e.*, the 14th Amendment's guarantee of "due process."

2. *The successful consummation of the Baldwins' plan to secure a $22,357.21 ex parte judgment against the Surety Co. without notice.*

Events of June 23, 1930.

After the Baldwin suit had been finally dismissed as to the Singer Co. (May 24, 1930, R. 16; p. 4, *supra*), the Baldwins' counsel, Messrs. Ailshie and Smead, after full consideration, decided that June 23, 1930, was the earliest day possible to move for a judgment against the Surety Co. (No. 21, pp. 99, 102-3); and

> "We carefully computed the time and discussed the form of the motion, judgment, etc. and examined authorities bearing thereon . . . carefully calculated the time which must elapse before said proceeding could be taken, to wit, 30 days after the filing of the aforesaid *remittitur*, and discovered that June 21, 1930, would be the 30th day after such filing, excluding the date of such filing in the District [State] Court as aforesaid, which date of filing said *remittitur* was May 22, 1930; that said 21st day of June fell on Saturday, and that affiant [Smead] and said Ailshie therefore discovered that the first judicial day upon which such proceeding against said surety company on its undertaking could be had was Monday, June 23, 1930."

On June 23, 1930, Mr. Ailshie appeared before Judge KOELSCH (who, up to that time, had not had anything whatever to do with the *Baldwin* litigation, R. 2, 17), who was then listening to an argument on a petition for re-hear-

ing in a certain *Dufresne* case, in which J. F. Martin, counsel for the Singer Co. happened to be engaged (No. 21, pp. 90, 113, 181); Mr. Ailshie "sat down in one of the jurors' chairs and to all intents and purposes was listening to the argument made by counsel in the other [*Dufresne*] matter" (*Id.*). Mr. Ailshie himself, thus described his own mental attitude at that moment (No. 21, p. 181)

> "I rather *smiled inwardly* at the fact that J. F. Martin [Singer Co.'s lawyer] should be present at the time I was waiting my turn to make the motion for judgment against the American Surety Co."

After the *Dufresne* case had been disposed of, Mr. Ailshie (instead of speaking from the bar where everyone could hear him) stepped up to Judge Koelsch's desk and *orally* (certainly unobtrusively, if not secretly)* moved for judgment in favor of the Baldwins against the Surety Co., handing to Judge Koelsch a form of judgment to be signed against the Surety Co., together with all the court papers in the *Baldwin* Case (No. 21, pp. 99, 100, 104, 113, 115).

Judge Koelsch immediately asked Mr. Ailshie if notice had been given to the Surety Co., to which Mr. Ailshie

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* Mr. Ailshie defended his failure to call Mr. Martin's attention to what he [Ailshie] was about to do, thusly (No. 21, p. 182):

> "Martin & Martin were not attorneys for the American Surety Co. and therefore the said J. F. Martin would have had no right or authority to appear in connection with said motion, even if I had especially asked him to remain."

Mr. Ailshie overlooked the obvious fact that the Singer Co. (Mr. Martin's client) *would be liable over,* as indemnitor of its surety or by subrogation, *for any judgment against the Surety Co.;* and hence, as principal, the Singer Co. had an absolute right to be heard on so vital a matter affecting its surety and itself.

replied that *"no notice was necessary,"* and submitted some authorities to that effect (No. 21, pp. 100, 106, 114). Mr. Ailshie walked with Judge Koelsch to the latter's Chambers, where they further discussed the necessity of notice to the Surety Co., ending by Judge Koelsch taking the matter under advisement (No. 21, pp. 100, 106, 114, 115).

While waiting for Judge Koelsch to act, Mr. Ailshie sat during the afternoon in the near-by Chambers of Judge Brinck (who, 30 days before, had signed the judgment dismissing the Baldwin suit as against the Singer Co., R. 17), discussing with him the obtention from Judge Koelsch of a $22,357.21 *ex parte* judgment against the Surety Co. without giving it any notice (No. 21, pp. 100, 101, 115, 116).

They were still engaged in that discussion when Judge Koelsch walked in to speak to Judge Brinck about entering the proposed judgment without notice. Mr. Ailshie stepped into the adjoining room and waited.

Judge Koelsch gives an illuminating account of his interview in Judge Brinck's Chambers just before signing the $22,357.21 *ex parte* judgment against the Surety Co., without any notice to it (although his first query that morning on the oral presentation of the matter, had been *"Was notice given to the other side"?* No. 21, p. 114);

> "I remarked to Judge Brinck 'I am about to sign an important judgment.' Judge Brinck *smiled* . . . I then remarked, in substance and effect, that I had studied over the matter and believed *that was the only thing for me to do.* Judge Brinck responded by saying 'I would do it because undoubtedly the defendant *will take some procedure which will get its day in court.*' . . . I stated in

> the interview with General Martin and Mr. Morrow [June 4, 1931, a year after the entry] that at that time I considered that the signing of the judgment in the way it was done was a formal matter, with the idea that the defendant would take such procedure *as would give it a hearing.*" . . .

After those few words between the two Judges, Judge Koelsch stepped into the Court room where Mr. Ailshie was still waiting; signed the $22,357.21 judgment against the Surety Co. and gave it to the Clerk for entry* (No. 21, pp. 116, 117, 120; for Judge Koelsch's account of the entire transaction, see Record in No. 21, pp. 113-121; 105-107; 178-179). The judgment was at once entered (R. 18-20).

Mr. Ailshie immediately had an execution issued thereon against the Surety Co., and levied on $23,000 Liberty Bonds which the Surety Co. had on deposit with the Idaho State Treasurer. The Sheriff took possession of the bonds and advertised the sale thereof for June 31, 1930 (R. 29; No. 21, p. 182).

3. *The Surety Co.'s first knowledge of the judgment; its motion to vacate it; and Judge Koelsch's action in setting aside the judgment as void, and quashing the execution thereon.* The next morning—June 24, 1930—Mr. Ailshie

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* The Record in No. 21 contains considerable evidence concerning the exact circumstances under which Judge Koelsch heard the motion therefor, and signed the June 23, 1930 judgment; and particularly whether he did so in his Chambers or in open court (Cf. pp. 76, 77, 81, 85-91, 107, 116-120, 136). But however that may be, it is undisputed that no one—*not even the clerk* (pp. 85-91)—was present, except Judge Koelsch and Mr. Ailshie, at the presentation of the oral motion, during the discussion between them thereon, or at the signing of the judgment. (*Id.*)

(feeling secure in the obtention of the judgment with its carefully prepared supporting recitals, and with no other attendant record on which error might be predicated) notified the Surety Co. of the judgment and execution, which was its first notice thereof (No. 21, pp. 79, 182).

The Surety Co. immediately moved before Judge Koelsch to vacate the judgment and stay the execution (R. 21-24).*

On August 12, 1930, Judge Koelsch, in a careful opinion analysing the *supersedeas* and reviewing the authorities (No. 21, pp. 153-165); *sustained* the Surety Co.'s motion and entered a decree that the $22,357.21 *ex parte* judgment of June 23, 1930 (R. 32, 33),

> "be and the same hereby is, *vacated, annulled and set aside,* and the same is hereby declared to be *null and void,* and the execution issued pursuant thereto be, and the same hereby is *quashed* and recalled."

On August 19, 1930, the Baldwins appealed from Judge Koelsch's decree setting aside the June 23, 1930, *ex parte* judgment (R. 35-44).

4. *The Idaho Court reversed Judge Koelsch, thereby reinstating the ex parte $22,357.21 judgment against the Surety Co.* On May 2, 1931, the Supreme Court of Idaho reversed Judge Koelsch's decree (which had set aside the June 23d judgment as void); and, thereby, the June 23d

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* The Surety Co.'s procedure in promptly moving the trial court to vacate its judgment (and while it still had full control thereover), was apparently the proper course, both under the general rule, and under the Idaho practice—certainly no contrary rule had theretofore been established in Idaho jurisprudence (See authorities collated R. 103-112); and there seemed to be no reason for the Surety Co. to *appeal* from the *ex parte* judgment of June 23, 1930, rather than to seek to have the court which had entered it, to set it aside.

ex parte judgment, and the execution thereon, were automatically re-instated in full force upon the ground that no notice was necessary to the Surety Co.; that there was a "color of legal right" in the Baldwins to have judgment against the Surety Co.; and, hence when the Baldwins orally moved for the judgment, it was the lower court's judicial duty to decide that question one way or the other; that the sole question was one of *jurisdiction* only, *i. e.*, did the lower court have *jurisdiction* to construe the "undertaking" and to enter the June 23d judgment; that the lower court had such jurisdiction; having once (June 23) decided in favor of the Baldwins, its judgment was not void, and that it had no power later to set it aside as void. The Supreme Court reached this result without itself construing the "undertaking" or deciding whether the June 23d *ex parte* judgment was right or wrong (R. 46; BUDGE, *J.*, dissenting, R. 55-63). The opinion indicated that the Surety Co. should have *appealed* from the June 23d judgment, instead of applying to the lower court to set it aside (R. 50, 54); but, by the time that view was expressed (May 2, 1931), the 90 day limit on appeal had long since expired.*

BUDGE, *J.*, dissented on the ground that the result was (R. 63)

> "a miscarriage of justice, and is repugnant to both the State and Federal Constitutions in that the surety company is deprived of its property *without due process of law.*"

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* The Supreme Court of Idaho might have decided the case promptly enough to have enabled the Surety Co. still to *appeal* from the June 23d judgment. But it did not do so. It did not announce what it thought the Surety Co. should have done, until it was too late to do it!

The Surety Co. filed an elaborate petition for rehearing raising the "due process" question under both the State and Federal Constitutions, as well as discussing the Idaho law, with a full review of the authorities (R. 64-116) which was denied ten days later (R. 117).*

The result of the Idaho decision was that the Surety Co. is now held liable for a $19,500 judgment (and interest thereon) against Anderson, whom it never bonded; and it has never had an opportunity to defend against any such liability being imposed on it. Even conceding its right to have appealed from the *ex parte* judgment, it is not "due process" to let a judgment be rendered without notice even if an appeal is provided for. To constitute "due process" there must be an opportunity to be heard *before* the rendition of judgment.

A petition for *certiorari* was then granted (R. 119; 286 U. S. 536).

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* In order to exhaust every avenue of relief, the Surety Co. [although deeming it hopeless as out of time], appealed on July 13, 1931, from the June 23, 1930, judgment. The appeal was dismissed because "taken more than ninety days after the entry of said judgment" (*Baldwin* v. *Anderson,* Idaho, 8 Pac. (2d) 461, decided February 21, 1932; BUDGE, *J.*, dissenting).

At the same time, the Surety Co. also endeavored to have the lower court correct its judgment of June 23, 1930, so as to show that the proceedings leading up to it and its entry, were had in Chambers, and not in open Court, supported by considerable evidence (No. 21, pp. 67-133; pp. 6 to 9, *supra,* note); but on July 13, 1931, the lower court denied the motion (No. 21, p. 133), which was affirmed by a 3 to 2 decision on July 12, 1932. *Baldwin* v. *Anderson,* 13 Pac. (2d) 650; LEEPER and BUDGE, *JJ.*, dissenting in a long opinion).

No. 21; American Surety Co. v. Baldwin, 51 Fed. (2) 596; C. C. A. 55 Fed. (2d) 555.

5. *The Surety Co.'s successful effort in the Circuit Court of Appeals to enjoin the Baldwins from enforcing the June 23, 1930, ex parte judgment.* On July 6, 1931 (shortly after the Supreme Court of Idaho had reversed Judge Koelsch and reinstated the June 23d judgment), the Surety Co. filed its bill in equity in the Federal Court in Idaho, to enjoin the Baldwins from enforcing the *ex parte* judgment or selling $25,000 Liberty Bond seized thereunder (No. 21, pp. 1-17).

On hearing the respective motions for a temporary injunction (No. 21, p. 27) and to dismiss (*Id.*, p. 144), the District Court (CAVANAH, *J.*) denied the injunction and dismissed the Surety Co.'s bill, upon the ground that the Surety Co. had once had an adequate remedy *at law* if it had chosen to *appeal* from the *ex parte* judgment, and its failure to avail itself of that right did not open the Federal equity courts to it; that no fraud, accident or mistake was shown; and comity required the Federal Courts not to review what the State courts had done (No. 21, pp. 184-192).

The Circuit Court of Appeals *reversed* that decree, upon the authority of *National Exchange Bank* v. *Wiley*, 195 U. S. 257; and held (just as Judge Koelsch had held) that the *ex parte* judgment of June 23, 1930, against the Surety Co. was *void* because the State Court did not acquire jurisdiction over the Surety Co. to render a judgment against it for *Anderson's* default, by virtue of the *supersedeas*

undertaking; and this for the reason that such "undertaking" only gave the Surety Co.'s consent to submit itself to the jurisdiction of the State Court in so far as the *Singer Co.* was concerned; that the Surety Co. had neither waived notice nor been given notice so far as its liability for *Anderson* was concerned (No. 21, pp. 250-264).

On Baldwins' petition, *certiorari* was granted simultaneously with that of the Surety Co. (No. 21, p. 271; 286 U. S. 537).

Specification of Errors [No. 3].

1. The Supreme Court of Idaho erred in holding that, under the Idaho Statutes, § 7155, a valid judgment could be rendered, *without service of process or other notice,* against the Surety Co. for the amount of a judgment against one Ed. Anderson, when the Surety Co. had never consented to be bound therefor, but had only consented to be bound for any judgment against the Singer Co.; and that Surety Co. could not attack it as void but was limited to an appeal on an *ex parte* record.

2. The "due process" of law which the 14th Amendment guarantees to the Surety Co., involves some notice or an opportunity to be heard *before* personal judgment can be rendered against it.

SUMMARY OF POINTS DISCUSSED.

FIRST POINT [No. 3].

Idaho has deprived the Surety Co. of its property without due process of law, because;

1. The Surety Co. did not consent in advance (by the supersedeas) that judgment might be rendered against it for the Anderson judgment, if it were affirmed.
2. The ex parte judgment against the Surety Co. was, therefore, absolutely void for lack of summons or notice.
3. The fatal effect of (1) and (2) cannot be avoided by saying the Surety Co. might have appealed to the Supreme Court of Idaho for relief from the ex parte judgment.

SECOND POINT [No. 21].

The Circuit Court of Appeals was right in holding that the Federal Court should enjoin the enforcement of the June 23d judgment.

FIRST POINT [No. 3].

Idaho has deprived the Surety Co. of its property without due process of law, because;

1. The Surety Co. did not consent in advance (by the supersedeas) that judgment might be rendered against it for the Anderson judgment, if it were affirmed.
2. The ex parte judgment against the Surety Co. was, therefore, absolutely void for lack of summons or notice.
3. The fatal effect of (1) and (2) cannot be avoided by saying the Surety Co. might have appealed to the Supreme Court of Idaho for relief from the ex parte judgment.

We submit:

I. *The Surety Co. did not consent in advance, that a judgment might be rendered against it for the amount of the judgment against Anderson, if the latter judgment should be affirmed.*

The vital question in this case, upon which all else hangs, is to determine exactly what the Surety Co. agreed to, by its *supersedeas* "undertaking," given under, and in the exact language of, § 7155 (p. 2, *supra*).

As the Supreme Court of Idaho expressly refused* to construe either the statute or *supersedeas*, this Court is free to construe them, as an original proposition, according to its own views (*Merchants National Bank* v. *Richmond*, 256 U. S. 635, at 638; *Carlson* v. *Washington*, 234 U. S. 103, at 106). The *supersedeas* "undertaking" reads (R. 6, 7);

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

SINGER SEWING MACHINE COMPANY, a Corporation, and ED ANDERSON,
Defendants.

UNDERTAKING ON APPEAL.

Whereas the defendant, Singer Sewing Machine Company, a corporation, in the above-entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above-entitled action and in the above-entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand

* R. 51, fol. 148; R. 54, fol. 162.

Five Hundred ($19,500.00) Dollars and for Seventy-three and 70-100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three and 70-100 ($19,573.70) Dollars, and from the whole of said judgment;

AND WHEREAS, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appeal from;

NOW, THEREFORE, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70-100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

IN WITNESS WHEREOF, the said American Surety Company, has caused its name and seal to be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

For easy reference, the two vital clauses will be designated as Clause A and Clause B respectively.

I.

"From the instrument itself"—to use the canon of interpretation laid down by the Supreme Court of Idaho to determine the obligations of the "undertaking" (R. 51)*—one would never dream that there was a $19,573.70 judgment against *Anderson;* but only that there was such a judgment against the *Singer Co.*

The "undertaking" recites that the *Singer Co.* "has appealed . . . from the judgment made and entered against *it*" [describing the judgment by court, action, date and amount] "and from the whole of said judgment" and "is desirous of staying the execution of said judgment so appealed from." The Surety Co. then acknowledges itself bound for $25,000 upon condition,

Clause A.

> "that if the said judgment appealed from, or any part thereof, be affirmed or the appeal dismissed, the appellant [Singer Co.] will pay . . . the amount directed to be paid as to which said judgment should be affirmed, if affirmed only in part and all damages and costs which may be awarded against the appellant upon the appeal."

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* Although the Surety Co. is called "the undersigned *surety*" (R. 7, fol. 21), and the contemporaneous endorsement of Baldwins' counsel designates it as a *"bond"* (R. 8, fol. 23), the Idaho Supreme Court sought to differentiate it from the ordinary supersedeas surety bond, saying (R. 51):

> "The undertaking is a complete independent contract. The obligation of its maker is not collateral. *Moffat* v. *Greenawalt* (Cal.), 27 Pac. 296. *Its obligations are to be determined from the instrument itself.*"

There is nothing in the "instrument itself" to indicate that there ever was any judgment against *Anderson.*

Clause A means that the Surety Co. guarantees (to the extent of $25,000) that the Singer Co. will pay all or any part of the judgment affirmed *as to it*, and all damages and costs awarded against *it*. The Surety Co. *did not* guarantee that the Singer Co. would pay a judgment from which it should be released by *reversal*,—even though, perchance, the judgment should be affirmed as to some one else [Anderson] whose very existence or appeal is not even disclosed in the bond.

No one can read into Clause A any condition that the Singer Co. would pay anything, except (*a*) the judgment so far as it should be affirmed against *it* and (*b*) all damages and costs awarded against *it*.

The "undertaking" then goes on to state affirmatively the following explicit terms, on which,—and only on which—the Surety Co. consented, in advance, to let a judgment go against itself (R. 7), towit;

Clause B.

> "if the said appellant [Singer Co.] does not make such payment within 30 days from the filing of the remittitur . . . judgment may be entered on motion of the respondents [Baldwins] in their favor and against the undersigned surety [Surety Co.] for the said sum of $19,573.70 together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant Singer Co., upon the appeal."

The Surety Co. thereby consented, in advance, that judgment might be taken against it for $19,570.70 with interest, and for all damages and costs awarded against the Singer Co., if the latter failed to pay exactly these same items

which Clause A guaranteed it would pay. And so we are automatically remitted to Clause A to ascertain *what* the Surety Co. guaranteed the Singer Co. would pay.*

Therefore, as stated above (p. 16), the vital question which this Court must determine is; What did the *supersedeas* "undertaking" obligate the Surety Co. to do? Was it bound only for the Singer Co.'s judgment? Or was it also bound to pay the judgment against *Anderson,* even after the Singer Co. judgment should be *reversed?*

When those questions are once answered, the correct result follows easily.

II.

After *eleven* different judges—[Koelsch, McNaughton, Lee, Givens, Varian, Budge, Leeper, Cavanah, Wilbur, Sawtelle and James, *JJ.*] in *four* courts, [the Idaho lower and appellate courts, as well as the U. S. District Court and Circuit Court of Appeals], had heard *argument* on the merits as to the meaning of the "undertaking", and delivered *five* opinions, **not one judge ever intimated that the Surety Co. became supersedeas for Anderson or that the judgment against him had been stayed.**

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* As both Clauses A and B limit the "damages and costs," to such as "may be awarded against the appellant, *Singer Co.,* upon the appeal", even the Baldwins concede that they cannot, and they have not attempted to, recover from the Surety Co. the "damages and costs" awarded against *Anderson.* The Baldwins assert, however, the anomalous claim that, although the Singer Co. was *dismissed* from the suit, nevertheless the Surety Co. guaranteed that the Singer Co. would pay the *judgment* against Anderson, but *not* the "damages and costs" against him, while, at the same time, the Singer Co. recovered $488.55 costs against the Baldwins. (R. 16.)

On the contrary, four opinions expressed the views of *six* judges that the Surety Co. never bound itself for Anderson, but only for the Singer Co., and that no judgment should be rendered against the Surety Co. (Koelsch, *J.*, No. 21, pp. 153-165; C. C. A. No. 21, pp. 257-260; Budge, *J.*, dissenting, R. 55-63; Leeper, *J.*, dissenting, 13 Pac. (2) 652).

The views of KOELSCH, *J.*, and BUDGE, *J.*, are so persuasive that some of the more important parts of their opinions are now reproduced:

KOELSCH, *J.*, after reviewing various authorities, said (No. 21, 163):

> "In the bond under consideration in the case at bar, the nouns and pronouns referring to the appellant are *all in the singular*, and the *verbs* correspond *therewith*. . . .
>
> "This preamble says nothing about the appeal on the part of the defendant Ed. Anderson; it speaks only of the appeal by the Sewing Machine Company. It will also be noticed that it refers to the judgment as a 'judgment made and entered against it.' If this thought be kept in mind, it is logical to conclude that in the phrase expressing the desire of staying execution of 'said judgment,' it likewise referred only to the judgment in so far as it concerned it, and it alone.
>
> "But thus far I have considered only the preamble, which after all, does not constitute the contract on the part of the surety. And while this preamble (as well as the notice of appeal, etc.) may be considered, and in case of doubt, might solve the doubt, the contract of the surety must be ascertained from the condition and the obligation of the bond. And here, the language of the bond under consideration is even more explicit in its limitation to the Singer Sewing Machine Company, as a single appellant: [Quotation of bond omitted. See pp. 16, 17, *supra*.]
>
> "This language, it seems to me, is far more explicit than that found in the bond considered in *Thomas* vs. *Lee*, and

more certain even than that contained in the bond considered in *Bergevin* vs. *Wood*. And, certainly, when construed in the light of the rule laid down by the cases that a surety is entitled to strict construction of his undertaking, the bond leaves no room for doubt that it was intended, and in effect, is, a bond only on behalf of the appellant Singer Sewing Machine Company."

BUDGE, *J.* (R. 59);

"The supersedeas bond upon its face and throughout its contents shows clearly that it was given to stay execution upon the judgment and the whole thereof entered against the Sewing Machine Company. Anderson's name nowhere appears in the bond, and in order to uphold the judgment entered upon the supersedeas bond it becomes necessary for the court to read into the bond that it was given to stay execution of the judgment against Anderson as well as against the Sewing Machine Company. This the court has no authority to do.

It is fallacious to contend that under a judgment joint in form but in fact and in law joint and several against two or more defendants, a stay of execution on such judgment in favor of one of the defendants pending an appeal is a stay of execution as against all of the defendants. It is likewise illogical to contend that a supersedeas bond stays proceedings in favor of a person not named in the bond. Appellants were in a position at any time from the entry of the original judgment against the Sewing Machine Company and Anderson to execute upon the judgment against Anderson, the latter having furnished no supersedeas bond. C. S. secs. 7155, 6902 (amended, Sess. Laws 1929, p. 70); 23 C. J., p. 533; 3 C. J., p. 1324, Sec. 1451; 2 Cal Jur., p. 472, Sec. 222; *Drahant* v. *Cure* (Pa.), 124 At. 340; *State* v. *Beveridge* (Or), 218 Pac. 1112; *Bergevin* v. *Wood* (Cal.), 105 Pac. 935; *Ex parte French*, 100 U. S. 1.

The supersedeas bond is the foundation of the judgment obtained thereon and must be interpreted from its

four corners. The surety is entitled to have his bond strictly construed. His liability cannot be extended by implication. He has a right to stand upon the exact words of his contract, and his liability is limited to the language of his bond. (*City of Pocotello* v. *Fargo*, 41 Ida. 432, *Jackson* v. *Barrett*, 12 Ida. 465).

With this principle in mind the bond should be examined for the purpose of determining whether the court had jurisdiction to enter the particular judgment. The court must not only have jurisdiction of the person and the subject matter but power and authority to render the particular judgment. In the opening of the bond we find this language:

> 'Whereas, the defendant Singer Sewing Machine Company, a corporation, in the above entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above entitled action in the above entitled court in favor of the plaintiffs in said action . . . and from the whole of said judgment.'

The whole of said judgment against the Singer Sewing Machine Company, not the whole of the judgment against Anderson. Anderson is an entire stranger to the American Surety Company. That he was never thought of when the supersedeas bond was given is a fact apparent from the entire record. To read his name into the bond or to create a liability against the American Surety Company by reason of the fact that the judgment was rendered against Anderson and the Singer Sewing Machine Company is to do violence to the language of the bonds. No language could be plainer to my mind, from a reading of the bond, than that it was the intention of the American Surety Company to furnish a supersedeas bond for the Singer Sewing Machine Company alone. Had it intended to furnish a bond for both the sewing machine company and Anderson, language would have been used to that effect. It names the Singer Sewing Machine Company in its bond, it refers

to the judgment entered against the Sewing Machine Company in its bond, and the bond is given to stay execution against the whole of the judgment entered against the Sewing Machine Company. This is further emphasized by the next paragraph of the bond, which is as follows:

> 'And whereas, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from.'

What judgment? The judgment appealed from by the Singer Sewing Machine Company. We must look to the whole instrument to gather the intention of the parties, the preamble as well as the condition of the bond, and particularly is this true where there is doubt. The condition of the bond is even more explicit than the preamble in limiting liability on the bond to a stay of execution against the Singer Sewing Machine Company. It is as follows:

[Quotation omitted here. See p. 17, *supra.*]

It affirmatively appears from the condition of the bond as above set out that the bond was given solely for the purpose of staying execution against the Singer Sewing Machine Company, with the amount of the judgment payable only in the event the judgment against the Singer Sewing Machine Company or any part thereof be affirmed. If the judgment against the sewing machine company had been affirmed in part the bond would be answerable to the extent of the affirmance."

III.

If this Court now construes the "undertaking" to mean that, in order to stay execution against the Singer Co., the Surety Co., agreed to pay any judgment that might be affirmed as against *Anderson,* then the Surety Co. consented in advance to a judgment against itself for the

Anderson judgment, and it has no cause for complaint that the judgment which it had agreed to, should be entered without further notice to it.*

But if, on the other hand, this Court construes the "undertaking" to mean, as we contend it means, that the Surety Co. only consented, in advance to a judgment against itself for any amount which might be affirmed as against its principal, *Singer Co.* then obviously it did not consent in advance to a judgment against itself for the Anderson judgment.

Thus, again, the vital question in this case is the construction which this Court gives to the supersedeas "undertaking."

If it shall be construed as we contend for, then we pass to the next question, namely, what is the result of an unauthorized judgment against the Surety Co. without any summons upon, or notice to it, *before* the rendition of such judgment?

II. *The ex parte judgment of June 23, 1930 against the Surety Co. was absolutely void for lack of summons or notice to it.*

The record here shows no summons or other notice to the Surety Co.; and it is conceded by all that no summons or notice was given it of the proposed *ex parte* judgment.

* The Baldwins contend that the judgment against the Singer Co. and Anderson was an "*indivisible*" judgment; that, hence, a *supersedeas* to stay execution against the Singer Co., necessarily stayed execution against Anderson; and that the Surety Co., thereby, bound itself to pay the "indivisible" judgment if affirmed in part.

The Idaho Supreme Court answered that contention by dividing the so-called "indivisible" judgment, affirming as to Anderson and reversing as to the Singer Co. (49 Idaho 231).

A personal money judgment cannot be rendered against a corporation unless it has been personally served with process within the State rendering the judgment, or has, in some way, consented to a waiver of process and agreed that judgment may be rendered against it.

If then, we are right in our contention (p. 16, *supra*) that the *supersedeas* "undertaking" did not give the Surety Co.'s consent in advance to a judgment against it for the *Anderson* judgment, it follows that the *ex parte* judgment of June 23, 1930, was absolutely void.

In *National Exchange Bank* v. *Wiley*, 195 U. S. 257, Wiley gave to the Exchange Bank a note which authorized a confession of judgment in favor of any *holder* of the note. The Exchange Bank obtained a judgment against Wiley in an Ohio State court by use of that authority. The Exchange Bank then sued Wiley in Nebraska on the Ohio judgment. Wiley defended in Nebraska on the ground that when the Ohio judgment was recovered, the Exchange Bank was not the holder, as it had previously sold the note to the Tiffin Bank. This Court held that the Ohio judgment was not even protected by the "full faith credit and clause" against an inquiry as to whether the consent Wiley gave had been exceeded in the obtention of the Ohio judgment; and that the Ohio judgment was not authorized, as the Exchange Bank was not the *holder*, saying (p. 268):

> "In other words, the defendant Wiley could show collaterally that he was not legally before the court—as he was not, in any just sense—if his appearance was entered and judgment confessed by one who had in fact, at the time, no authority to do either; and, consequently, that

> the court was without jurisdiction to proceed except on legal notice to him, or without his appearance in person or by an attorney authorized to represent him. If law and usage in Ohio were to the contrary, then such law and usage would be in conflict with the Constitution of the United States; for it is thoroughly settled that a personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law."

and also at page 270:

> "It was, in such case, in legal effect, a personal judgment without service of process upon the defendants, and without their appearance in person or by an authorized attorney. The proceedings were wanting in due process of law. The obligors never consented to judgment by confession in favor of one who was not the owner of the note or entitled to receive its proceeds, and the warrant of attorney cannot be held to have authorized such a confession."

As there, so here; The question is whether a certain written instrument, *i. e.*, the supersedeas, authorized an *ex parte* judgment for the *Anderson* debt. In the *Wylie* case, this court held that the instrument in question did not authorize in advance the entry of the *ex parte* judgment; that the question could not be decided in Wylie's absence; and that he could collaterally attack, as void, any judgment based upon a supposed consent which in fact he had not given. Similarly, if the Surety Co. had been sued in New York on the Idaho *ex parte* judgment, it could have defended by showing that it had not consented to a judgment for *Anderson's* debt, but only for the Singer Co.'s.

Here the supersedeas "undertaking" did not give the Surety Co.'s consent that an *ex parte* judgment might be rendered against it for the *Anderson* judgment; and the Surety Co. has the right collaterally to attack the June 23d judgment as void. But it would not do the Surety Co. any good to collaterally attack the judgment, because its $25,000 Liberty Bonds had been seized in Idaho under the judgment. So it attacked the judgment (1) directly in the Idaho courts, and (2) by injunction proceedings in the Federal courts to restrain the enforcement of the void judgment.

The supersedeas "undertaking" presents the justiciable question whether the Surety Co. guaranteed the *Anderson* judgment. To the extent that the "undertaking," properly construed, gave the Surety Co.'s consent in advance to the entry of a judgment against it, the Surety Co. became such a party to the suit as to give the Idaho courts jurisdiction over the Surety Co.'s person so as to render an *ex parte* judgment *so far as it was authorized by the supersedeas undertaking.* But when the Baldwins undertook to secure, *without notice* an *ex parte* judgment against the Surety Co., they did so *at their peril,* if it should ultimately turn out that the *ex parte* judgment was not authorized by the *supersedeas* "undertaking."

It was at that point that the Baldwins fell into the pit which they had prepared for the Surety Co. (p. 2, *supra*).

If the Surety Co. had been notified (with or without formal service of process) of the intention to hold it under the *supersedeas* "undertaking" for the *Anderson* judgment, and it had been given an opportunity to be heard on that subject *before* the rendition of the judgment, and the Idaho

courts had construed the *supersedeas* "undertaking" as giving the Surety Co.'s consent in advance to a judgment against it for the *Anderson* judgment, the Surety Co. would have had its day in court, the "due process" requirements of the Federal Constitution would probably have been fulfilled, and perhaps the Surety Co. would have had no ground for complaint under the Federal Constitution.

But the Surety Co.'s "undertaking" did not give to the Idaho courts jurisdiction over the Surety Co.'s person to render an *ex parte* judgment conclusive and beyond attack, if it should ultimately be held that the Idaho courts' *ex parte* construction of the "undertaking" was erroneous.

A court cannot acquire jurisdiction over the person of a defendant, by deciding *ex parte* that it has such jurisdiction, if in a subsequent proceeding the defendant can show that no such personal jurisdiction existed.

In *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25, 29, Mr. Justice HOLMES said;

> "A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant. But it must be taken to be established that a court cannot conclude all persons interested by the mere assertion of its own power (*Thompson* v. *Whitman*, 18 Wall 457) even where its power depends upon a fact and it finds the fact (*Tilt* v. *Kelsey*, 207, U. S. 43)."

In its last analysis, any court which assumes to decide (in the absence of a defendant) that it has jurisdiction of his person, always runs the risk of this Court deciding under the "due process" clause, that such court did not have personal jurisdiction over the defendant.

This discussion, therefore, again brings us back again to the fundamental question: Did the *supersedeas* "undertaking," bind the Surety Co. for the *Anderson* judgment?

This Court's determination of that question, automatically decides whether the June 23d judgment was void or valid.

III. *The Supreme Court of Idaho can not deprive the Surety Co. of its right to Federal protection under the "due process" clause, by holding that the Surety Co. should have appealed from, instead of moving to set aside, the June 23d judgment; and that having mistakenly pursued an alleged erroneous procedure for relief, it is remediless.*

The Idaho Supreme Court declined to construe the *supersedeas* "undertaking" or to decide whether it bound the Surety Co. for the Anderson judgment (R. 50, 54).* It simply held (1) that by executing the *supersedeas,* the Surety Co. became a party to the suit, and could be proceeded against to judgment, without notice; (2) that when Judge Koelsch assumed to enter the June 23d judgment he decided, rightly or wrongly, that the *supersedeas* bound the Surety Co. for the *Anderson* judgment; (3) that the judgment so entered was not void, and the Surety Co.'s remedy was by *appeal* and not by immediate motion to set aside, as Judge Koelsch had no power to set aside a judgment after once entering it (R. 50, 54).

Such a position must be rejected, because: 1. If, as we contend, the June 23d judgment was in fact void for lack of "due process", then this Court has jurisdiction to review

* The Court said:

"We disclaim any intention or right to construe the legal effect of the undertaking . . . The undertaking cannot be examined and its legal effect as to this issue be determined by us on this appeal."

the Federal question by *certiorari* which it has already granted.

2. Relief by *certiorari* can not be defeated on the ground that the Surety Co. *might* have appealed to the Idaho Supreme Court for relief instead of moving to set aside the void judgment. If the judgment was void (as we contend) under the Federal Constitution, it can not be cured by a State Court's queer decision on procedure.

Even if the Surety Co. had appealed, no one knows what the Idaho Court would have done; and the record on such appeal would have been a purely *ex parte* record, cleverly contrived by Mr. Ailshie, in the absence of the Surety Co. to support if possible the judgment he had obtained. Under the "due process" clause, the Surety Co. was entitled to be heard *before* the judgment was rendered, so that it would have an opportunity to get into the record whatever it deemed essential for its protection (*Missouri* v. *North*, 271 U. S. 40, 42; *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581; *Windsor* v. *McVeigh*, 93 U. S. 277; *Hovey* v. *Elliott*, 167 U. S. 409; *Riverside &c Mills* v. *Menefee*, 237 U. S. 189; *Truax* v. *Corrigan*, 257 U. S. 312, 332; *Hurtado* v. *California*, 110 U. S. 516, 535).

A hearing limited to an ex parte record, where the injured party had no opportunity to be heard or present his proofs, does not afford "due process of law".

3. The Surety Co. is not, in No. 3, making a collateral attack on the June 23d judgment. It is making a *direct attack* on it by *certiorari;* it is seeking to reverse a State Court holding that a binding judgment can be rendered when the defendant has not been summoned, nor (as we contend) consented in advance to a judgment for the Anderson debt.

SECOND POINT [No. 21].

The Circuit Court of Appeals was right in holding that the Federal Court should enjoin the enforcement of the June 23d judgment.

The Circuit Court of Appeals held,

1. That when the Surety Co. signed the *supersedeas* bond it became, to a certain extent, a party to the *Baldwin* suit and was bound by subsequent proceedings, even though erroneously taken against it (No. 21, p. 258; *U. S. F. & G. Co.* v. *Ft. Misery &c. District,* 22 Fed. (2d) 369).

2. That by the *supersedeas* "undertaking," the Surety Co. agreed that judgment might be entered against it, without notice, only if judgment against the *Singer Co.* were affirmed; but that the Surety Co. did not agree that judgment might be entered against it in any other event (No. 21, pp. 257-258).

3. That as the *Singer Co.* judgment was *reversed,* there was no agreement by the Surety Co. to any judgment for Anderson's debt (No. 21, p. 258); and that the June 23d judgment was void (No. 21, pp. 258-260; *Natl. Exchange Bank* v. *Wiley,* 195 U. S. 257).

The jurisdiction of the Federal Courts to enjoin judgments obtained at law in the State courts, where the enforcement of such judgments would be unconscionable is undoubted (*Wells-Fargo & Co.* v. *Taylor,* 254 U. S. 175;

Simon v. *Southern Ry. Co.*, 236 U. S. 115; *Marshall* v. *Holmes*, 141 U. S. 589; *Exchange Natl. Bank* v. *Joseph Reid Co.*, 287 Fed. 870; *Natl. Surety Co.* v. *State Bank*, 120 Fed. 593).

Even if the *ex parte* judgment of June 23, 1930 was not technically void for lack of process, the Federal courts have the power to enjoin its enforcement where:—

(a) it is unconscionable;

(b) the injured party had no actual notice and has had no opportunity to defend, through no fault of his own; and

(c) the injured party has no adequate remedy at law *in the Federal courts.*

The alleged remedy suggested by the Supreme Court of Idaho of appeal on an *ex parte* record, without opportunity to the injured party to present his proofs, not only violates the 14th Amendment but certainly does not afford an adequate remedy at law.

This case then comes back to the same points discussed in No. 3.

If the June 23d judgment was void, because the Surety Co. never agreed that a judgment might be entered up against it for *Anderson's* debt, then the Federal Courts ought to enjoin the enforcement of it.

The Surety Co. has not asked the Federal Courts to overrule or to reverse a State Court's interpretation of a *supersedeas* given under a State statute. The State courts *refused* to interpret it.* Therefore the Surety Co. insists, that, *in the absence of any Idaho State Court construction*

of the supersedeas, the Federal Court interpret it; and if it concludes that the Surety Co. did not agree to a judgment against itself for Anderson's debt, then that the Federal Courts shall hold that the judgment was void for want of process or consent; that "due process" was denied to the Surety Co., and that the Idaho judgment be reversed and/or the Baldwins enjoined from enforcing it.

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October 4, 1932.

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* Except Judge Koelsch who said it did not bind the Surety Co. for the Anderson judgment.